Submitted Jndgt Dake
Feb 31-5 5 7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 138.

FRANCIS X. DANT, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 24, 1874.

Reversed
Ch Hunt D
Costs

SUPREME COURT OF THE UNITED STATES.

No. 138.

FRANCIS X. DANT, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Bond	1	1
Writ of error and bond	2	1
Declaration	3	2
Plea	4	3
Joinder and note of issue	5	3
Orders of circuit court	6	4
Bill of exceptions	8	4
Motion for new trial	12	7
Order of court in general term	13	8
Clerk's certificate	14	8

a FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } No. 9463.

The answer of the chief-justice and the justices of the supreme court of the District of Columbia to the writ of error in above-entitled case, annexed hereto, is in the words of the record following:

1 In the supreme court of the District of Columbia the 20 day of January, 1874.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. In error.

Know all men by these presents that we, Francis X. Dant and Charles Walter, are bound unto the above-named District of Columbia in the sum of three hundred dollars, to be paid to the said District of Columbia or its successor; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 20th day of January, A. D. 1874.

Whereas the above-named Francis X. Dant hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia: Now, therefore, the condition of this obligation is, that if the above-named Francis X. Dant shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANCIS X. DANT. [SEAL.]
CHARLES WALTER. [SEAL.]

Sealed and delivered in presence of—
REGINALD FENDALL.

Approved this 20th day of January, A. D. 1874.
D. K. CARTTER,
Chief-Justice.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between Francis X. Dant, plaintiff, and the District of Columbia, defendant, No. 9463, at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court

to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 20th day of January, in the year of our Lord 1874, and of the Independence of the United States the 98th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Francis X. Dant is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Chf. Just.*

Service of citation acknowledged.

WILLIAM A. COOK,
Atty. for D. C.

3 *Declaration.*

In the supreme court of the District of Columbia, the day of March, A. D. 1872.

FRANCIS X. DANT, PLAINTIFF,
vs.
DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. Declaration.

The plaintiff sues the defendant, for that whereas, at the time of and for a long time before the bringing of this suit, there was, and still is, a certain common and public highway in the city of Washington, in the District of Columbia, called Delaware avenue; which highway is used by the good citizens of the United States for passing and repassing therein, on foot as well as with horses, carts, carriages, and other vehicles; and whereas said defendant has used and was bound to keep the said highway in repair for the safe and convenient passage and transit of said good citizens of the United States over and through the same; nevertheless, the plaintiff alleges that heretofore, to wit, on the fourteenth day of November, A. D. 1871, the said highway was out of repair, and in a dangerous and unsafe condition, by reason of the default and negligence of the defendant; and that he, the plaintiff, then and there, to wit, on the day and year aforesaid, while using due care, and while lawfully passing on foot over and above and in the middle of said highway, in the night-time, stepped down, slipped, and fell into a deep and dangerous excavation, which was then and there, and for a long time before had been, in the middle of the highway aforesaid, left open, unguarded, and wholly unprotected, through the negligence and

want of due care on the part of the defendant, and thereby
4 one of the legs of the plaintiff became and was broken and otherwise injured, and the plaintiff was lamed for life, and greatly bruised and wounded; and also by means of the premises the plaintiff became and was sick, lame, and disordered for a long space of time, during which he suffered great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs, and was deprived of divers gains and profits, which otherwise he might have acquired, and was forced to expend large sums of money, amounting in the whole to $500.00, in and about endeavoring to be cured of said fractures, bruises, and injuries, whereby the plaintiff says he has sustained damage in the sum of $10,000, and therefore he brings his suit.

FENDALL & FENDALL,
Attys. for Plff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise, judgment.

FENDALL & FENDALL,
Attys. for Plff.

Pleas.

In the supreme court of the District of Columbia, this 7th day of May, 1872.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463. Pleas.

The defendant says that it is not guilty as alleged.

2. And for a further plea the defendant says that it was not intrusted with the care of, and had no control over, the avenue mentioned in the declaration, at the time of the occurrence of the alleged accident.

WILLIAM A. COOK,
Atty. for Deft.

5 *Joinder of issue.*

In the supreme court of the District of Columbia.

FRANCIS X. DANT
v.
THE DISTRICT OF COLUMBIA. } No. 9463. Law.

The pltf. joins issue upon the defendant's pleas.

FENDALL & FENDALL,
Attys. for Plt.

Note of issue.

Fendall & Fendall, Attys. for Plt.
William A. Cook, Atty. for Deft.

Last pleading filed May 13, 1872.

FENDALL & FENDALL,
Atty. for Deft.

To the Clerk.

(Endorsed:) Filed, 13 May, 1872.

6 *Orders in circuit court.*

WEDNESDAY, *November* 12, 1873.

Session resumed pursuant to adjournment. MacArthur, justice.

FRANCIS X. DANT, PLFF.,
vs.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9463. Cal. 58.

And now comes here as well the plaintiff, by his attorney, Mr. Fendall, as the defendant, by its attorney, Mr. Cook, and a jury of good and lawful men of this District, to wit, William C. Harper, Francis Mattingly, Joseph S. Boss, Wesley J. Scott, John H. Cunningham, Thomas Fahey, Charles Medford, John T. Proby, Peter H. Heller, John Crowley, John W. Coon, and Samuel Fowler, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

THURSDAY, *November* 13, 1873.

Session resumed pursuant to adjournment. MacArthur, justice, presiding.

7 FRANCIS X. DANT, PLFF.,
vs.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9463. Cal. 58.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath, say they find the issue aforesaid in favor of the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of its defence, to be taxed by the clerk, and have execution thereof.

FRANCIS X. DANT, PLFF.,
vs.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9463.

And now again comes here the plaintiff, by his said attorney, and files his four bills of exception to the rulings of the court on the trial of the case, duly signed and sealed, and prays that they may be made a part of the record, which is done accordingly, and the court fixes the amount of the bond at two hundred and fifty dollars. Bond approved and filed.

8 BILLS OF EXCEPTION.

Statement of case and bills exceptions.

In the supreme court of the District of Columbia.

FRANCIS X. DANT, PLAINTIFF,
vs.
DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9463.

Upon the trial of this cause, the plaintiff, to maintain the issue on his part joined, gave evidence tending to show that he is fifty-eight

years of age; is a carpenter by trade, and followed that particular branch of the trade which required him to climb and to lift heavy joist; that, on the night of the 14th of November, 1871, at about 8 o'clock, he arrived at his home, on 5th street, between L and M, northeast, by a route which he habitually traveled in safety, and which was safe; that immediately upon his arrival he was met by his wife with the intelligence that his son was ill, and that he must go at once to the apothecary for medicine; that he at once started to go for the medicine, along the route he had just passed over, intending to go to an apothecary-store on the corner of H and North Capitol streets, the nearest apothecary-store to him; that the night was very dark and rainy, and he could not see; and he had to feel his way; he lived in that locality for three years, and passed this cut as often as twice a day, and knew perfectly well that the cut was there; that he would not have gone up there if he had known what he was about; that even in daytime, if he had gone up by the alley, he could not have got down, and that he made a mistake in consequence of the darkness of the night; that there were no lamps and no lights of any description along the route, and never had been; that, in consequence of the darkness of the night and the absence of lamps, in his way down 2d street to Delaware avenue he turned into a public alley, which was nearest to I street; that his reason for supposing it to be I street was, that he felt the depression in the ground, the cobble-stones of the gutter, and the termination of the pavement; and that he saw opposite the opening of the alley a light in a window projecting from the west, exactly as the light in the window would have appeared from the corner of I street; that thus misled, and proceeding with haste along said alley and over an elevated plain forming the unoccupied part of Delaware avenue, when he fell down an excavation ten feet deep, in the
9 middle of Delaware avenue, between I and K streets, where also there were no lights other than such as were in a house on the west side of Delaware avenue; that in the fall the plaintiff broke his leg above the knee, the fracture being oblique; that plaintiff had always known that there was one alley intersecting this square, but that he had not previously noticed that there were two; that on this night, having felt the depression in the ground which marked the first alley, when he came to the second depression he never doubted that he had reached the corner of 2d and I; that to the street as well as the alley there was no paved sidewalk, and, to complete the resemblance, there was a small house at the corner of the alley and a small house at the corner of 2d and I; that plaintiff was aware of the excavation in Delaware avenue, but had not expected the route he traveled would lead him to it; that said excavation was caused by the corporation of the city of Washington (during Mr. Emery's administration, and in 1870) cutting down the surface of the west half of Delaware avenue about ten feet, and leaving the east half at its old grade, on a plane with 2d street, and with a continuous surface thereto; that there were houses on the east as well as the west side of said Delaware avenue, between I and K streets, and to pass from one to the other, persons had to go up and down a flight of wooden stairs, which were placed there very soon after the excavation, about which time a fence was run along the edge of the excavation, from I to K street, and that this barrier, broken and impaired from time to time, had entirely disappeared within six months after its erection and twelve months before this accident, and had never been renewed; that by reason of this accident plaintiff was confined to his bed for about four months, during which time he suffered great pain, mental and bodily;

was at expense in procuring medicines and medical attendance, had his right leg shortened two inches, and was crippled for life; that there were other unobstructed routes, by which the plaintiff could have reached his intended destination; that on the western side of Delaware avenue there was a good sidewalk, and about one-half of said avenue was in a good and safe condition for travelers alongside of the place of the accident; and thereupon the plaintiff further gave in evidence the charter of the city of Washington, being the act of incorporation, and the acts supplementary to and amendatory of, and in continuation of, the same, passed by the Congress of the United States, and approved respectively May 15, 1820; May 26, 1824; May 20, 1826; May 17, 1848; May 28, 1868; April 7, 1869; also the act of incorporation of the District of Columbia, passed by the Congress of the United States, and approved on 21 February, 1871.

And there the plaintiff rested.

Whereupon the defendant prayed the court to instruct the jury as follows:

FIRST BILL.

The present government of the District of Columbia differs from the late government of the corporation of Washington in this, viz: That under the act of Congress of the 21st of February, 1871, entitled "An act to provide a government for the District of Columbia," it is not charged with the care and control of the streets and avenues.

That act confers this care and control on the board of public works, composed of the appointees of the United States, who are paid by it, and over whom, as respects the regulation and repairs of the streets and avenues, the District government has no commanding or superintending power. If, therefore, a defect created by the old corporation of Washington, or an excavation or embankment existed on Delaware avenue which was the occasion of the injury of the plaintiff, the District of Columbia would not be responsible for the injury. To the granting of which the plaintiff objected; but the court overruled the objection and granted said prayer, to which ruling the plaintiff excepts, and prays the court to sign, seal, and cause to be enrolled this his first bill of exceptions; which is accordingly done this thirteenth day of November, A. D. 1873.

[SEAL.] ARTHUR MAC ARTHUR, *Justice.*

SECOND BILL.

And thereupon the plaintiff prayed the court to instruct the jury that the corporation of the District of Columbia, as the successor of the *the* corporation of the city of Washington, is liable for the injury to the plaintiff resulting from a nuisance created by the said corporation of the city of Washington; and the court refused to instruct the jury as prayed by the said prayer, to which refusal the plaintiff excepts, and prays the court to sign, seal, and cause to be enrolled this his second bill of exceptions; which is accordingly done this thirteenth day of November, A. D. 1873.

[SEAL.] ARTHUR MAC ARTHUR, *Justice.*

And thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: At the general term of this court the case of Barnes *vs.* The District of Columbia was decided on Monday last, in

which it was held, after careful examination of the question, that the District of Columbia was not liable for any injuries which individuals might sustain by reason of the streets or avenues being out of repair or in an unsafe condition. That Congress, in the act organizing a government for this District, had delegated the entire authority to the board of public works to keep the streets and avenues in repair, and to make all needful regulations for their management. That the members of the board of public works are appointed by the President, with the consent of the Senate of the United States, and their salaries paid by the General Government, who had invested them with the control of the streets and avenues. They are, therefore, to be regarded to this extent as independent of the District government; and as the latter had no power to control the streets and avenues, in respect to repairing or keeping them in order, it was not responsible for injuries that might occur on them.

This decision of the general term, I think, disposes of the case now on trial. The present action, like the one decided, is against the District of Columbia for a personal injury on one of our streets. I am, therefore, of opinion that it cannot be sustained, and instruct you to return a verdict for the defendant.

THIRD BILL.

To which portions of said charge, which states that the defendant is not liable for any injuries which individuals might sustain by reason of the streets and avenues being out of repair or in an unsafe condition; that the board of public works is vested with entire authority over said streets and avenues; and that the defendant is not responsible for injuries on said streets and avenues; and that instructs the jury to
12 return a verdict in favor of the defendant; the plaintiff excepts to the same separately, and prays the court to sign, seal, and cause to be enrolled this the third bill of exceptions; which was duly done this thirteenth day of November, A. D. 1873.

[SEAL.] ARTHUR MAC ARTHUR,
Justice.

Motion for new trial.

In the supreme court of the District of Columbia.

DANT
vs.
DISTRICT OF COLUMBIA. } At law. No. 9463. Motion for new trial.

And now comes the plaintiff in above-entitled cause and moves the court to set aside the verdict and for a new trial, and for cause shows:

That the court erred in its rulings of divers matters of law, which errors will appear by reference to the bills of exceptions prayed and taken at the trial.

November 13, 1873.

FENDALL & FENDALL,
Attys. for Plff.

13 *Order of court in general term.*

MONDAY, *January* 19, 1874.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

FRANCIS X. DANT, PLFF.,
vs.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9463.

And now come here as well the plaintiff as the defendant, by their respective attorneys; and thereupon, because it seems to the court here that there is no error in the proceedings of the circuit court, or in its judgment, therefore it is considered that the motion for a new trial upon exceptions be, and the same is hereby, overruled; and that the judgment aforesaid be, and the same is hereby, affirmed; and that the defendant recover against the plaintiff the costs of the cause to be taxed by the clerk.

14 *Clerk's certificate.*

DISTRICT OF COLUMBIA, *ss:*

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in my office, and that said originals constitute the record of the proceedings of said court in the cause of said Francis X. Dant against the District of Columbia, as aforesaid.

Witness my hand and the seal of said court this 23d day of January, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

(Indorsement on cover:) No. 138. Francis X. Dant, plaintiff in error, vs. The District of Columbia. District of Columbia sup. court. Filed 24th January, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1875.

FRANCIS X. DANT, Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error here and the plaintiff below brought case against the corporation of the District of Columbia, and alleged in his declaration that there was a public highway in the City of Washington called Delaware avenue, which the defendant was bound to keep in repair; nevertheless, the said highway was out of repair, and in an unsafe condition, by reason of the fault and negligence of the defendant; that the plaintiff, while using due care and while passing on foot along the middle of said avenue, in the night time, fell into a deep excavation, which had been left wholly unprotected through the negligence of the defendant, and thereby one of his legs was broken and he became crippled for life, and was prevented for a long time from transacting his necessary affairs, deprived of profits which he would otherwise have acquired, and was forced to spend large sums of money in endeavoring to be cured of his injuries, and claimed damages in the sum of $10,000.

To this the defendant filed two pleas, first, that it was not guilty as alleged, and second, that it was not intrusted with the care of, and had no control over, the avenue mentioned

in the declaration at the time of the occurrence of the alleged accident.

The plaintiff joined issue upon both of these pleas.

The only evidence offered at the trial was that submitted by the plaintiff, upon which the court instructed the jury to find a verdict in favor of the defendant.

Assignment of Errors.

The court below erred,

1. In granting the prayer of the defendant, and instructing the jury that the defendant was not responsible for an injury which was occasioned by a defect on Delaware avenue—one of the highways of the District of Columbia—created by the late corporation of the city of Washington. (1st Bill of Exceptions, Rec., p. 6.)

2. In refusing the prayer of the plaintiff to instruct the jury that the defendant, as the successor of the corporation of the city of Washington, would be liable for an injury resulting from a nuisance created by that corporation. (2d Bill of Exceptions, Rec., p. 6.)

3. In instructing the jury that the defendant was not liable for any injuries which individuals might sustain by reason of the streets and avenues in the District of Columbia being out of repair and in an unsafe and dangerous condition; that the Board of Public Works was vested with entire authority over said streets and avenues; that the defendant was not responsible for injuries on said streets and avenues; and to find a verdict in favor of the defendant. (3d Bill of Exceptions, Rec., pp. 6 and 7.)

Congress has power to exercise exclusive legislation over the territory of the District of Columbia. (Art. 8, Const. U. S.; act Md., Dec. 19, 1791.)

Congress, then, has equal authority over the District of Columbia that any State has over its territory, and may

create a municipal corporation. Congress also has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States. The establishment of a municipal corporation was a most appropriate, and in the judgment of Congress, was a necessary means of exercising its legislation over the District of Columbia. (See the Bank Case, 4 Wheat., 316.)

The evidence submitted at the trial below and succinctly set forth in the record (p. 5) established just such a case against a municipal corporation as courts of law have generally remedied by compensation in damages. (Weightman *v.* Washington City, 1 Bl., 39; Chicago *v.* Robbins, 2 Bl., 418; Mayor *v.* Sheffield, 4 Wall., 189; Providence *v.* Clapp, 17 How., 161; Currier *v.* Lowell, 16 Pick., 170; Thayer *v.* Boston, 19 Pick., 511; Inhabitants of Lowell *v.* R. R. Co., 23 Pick., 24; Rochester White Lead Company *v.* Rochester, 3 Comst., 463; Lloyd *v.* N. Y., 5. N. Y., 369; Hutson *v.* N. Y., 9 N. Y. 163; Storrs *v.* Utica, 17 N. Y., 105; Davenport *v.* Ruckman *et al.*, 37 N. Y., 568.)

The section 1 of the act of February 21, 1871, (16 St. at L., p. 419,) created the Government of the District of Columbia, and constituted it "a body corporate for *municipal purposes*," and bestows all the powers of a municipality over a territory whose limits are defined.

Among "municipal purposes" certainly is authority to widen, alter, and repair streets. (Van Ness *v.* Washington and U. S., 4 Pet., 232.)

After providing numerous other officers, executive and ministerial, the act, by section 37, establishes a Board of Public Works in (that is, as part of the government of) the District of Columbia, and appoints its functions, and these functions are wholly ministerial. This board has control of the streets, &c. Manifestly this is a mere ministerial contract. The board clearly has no authority to alter, widen, and repair streets, except as it may be directed by its *superior*, whose minister it is.

Clearly the Board of Public Works is merely a creature to carry out the directions of the superior.

The organic act not only constitutes the defendant in error a body corporate for "*municipal purposes*," but declares it to be "the *successor*" of the corporation of the city of Washington, (sec. 141,) *which had created the nuisance resulting in the injury to the plaintiff in error*. (Rec., p. 5.)

Again, it may be observed that the Board of Public Works were not only under the *control* of the defendant in error, but could not even appoint their officers and agents without its sanction, nor create a fund, either by taxation or otherwise, for any purpose whatever.

Neither in the 37th section nor in any other part of the act is there anything relieving the District of Columbia from its general responsibility, as a "municipal corporation," for the safe condition of its streets; and in such cases "the true rule of construction is that the Legislature intended that the corporation's liability should, to the extent of its corporate funds, be coextensive with that imposed by the general law upon individuals doing (or neglecting to do) the same thing." (Sherman & R. on Negligence, § 124.)

It is respectfully submitted that the judgment of the court below should be reversed with costs, and the cause remanded with directions to issue a new venire.

REGINALD FENDALL,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

FRANCIS X. DANT,
Plaintiff in Error.
vs.
THE DISTRICT OF COLUMBIA,
Defendant in Error.

No. 138.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On November 14th, 1871, plaintiff arrived at his home, on Fifth street, between L and M streets northeast, by a route which he habitually traveled in safety, and which, in fact, was safe. Being met by his wife, with the information that his son was ill, he at once started for the apothecary shop on the corner of H and East Capitol streets, in order to get some medicine, intending to proceed along the route he had just passed over. The night was dark and rainy, and he missed his way and turned into a public alley, supposing it to be I street. This alley was intersected by Delaware avenue. The surface on the west half of Delaware avenue had been cut down, leaving the east half at its old grade on a plane with Second street, and with a continuous surface

thereto. The plaintiff, proceeding in haste along the alley above mentioned, and over the east side of Delaware avenue, fell down the embankment formed by the lower grade on the west side of that avenue, "He knew perfectly well that the cut was there." "He passed it as often as twice a day for three years." "He would not have gone up there if he had known what he was about," for he was aware that "even in the day time if he had gone up the alley he could not have gone through."

The excavation in the avenue was made by the late Corporation of Washington, in 1870, and prior to the passage of the act of February 21, 1871, entitled "An Act to provide a government for the District of Columbia," (16 Stat. at L., 419,) repealing the charter of the city of Washington and creating a municipality called the District of Columbia. (Record, page 5.)

"There were other unobstructed routes by which the plaintiff could have reached his destination." (Record, page 6.) On the western side of Delaware avenue, there was a good sidewalk and about one-half of the avenue was in a good condition for travelers alongside of the place of the accident. (Record, page 6.)

On March 18th, 1872, plaintiff sued the District of Columbia for ten thousand five hundred dollars, ($10,500,) alleging in his declaration that the defendant was bound to keep Delaware avenue in repair as a public highway for safe and convenient passage. That on November 14th, 1871, it was out of repair and in a dangerous and unsafe condition, by reason of defendant's negligence; and that the plaintiff, while using due care and lawfully passing over, and in the middle of said highway, in the night time, fell into an excavation left unguarded through defendant's negligence, and received certain injuries. Defendant pleaded the general issue, and also a special plea that it was not entrusted with the care, and had no control, over the avenue mentioned in the declaration at the time of the occurrence of the alleged accident.

At the trial, after the defendant had given in evidence the facts above set forth, the court ruled that, under the act of Congress of February 21st, 1871, entitled "An Act to provide a government for the District of Columbia," (16 Stat. at L., 419,) the defendant was not charged with the care and control of the streets and avenues, but said care and control was committed to a Board of Public Works, composed of United States officials, and paid by the United States, and over whom, as respects the regulations and repairs of the streets and avenues, the government of the District had no commanding or superintending power. The court, therefore, instructed the jury to find a verdict for the defendant; which was done. Exceptions were taken at the trial in behalf of the plaintiff, raising the question of the correctness of this ruling.

The question in the case is simply whether, under the act of February 21st, 1871, the District of Columbia was required to keep the streets and avenues of the City of Washington in repair; was entrusted with ample power so to do, and could be held liable for injuries resulting to an individual by reason of failure to repair a street rendered unsafe by an excavation made before the District of Columbia was created a municipal corporation.

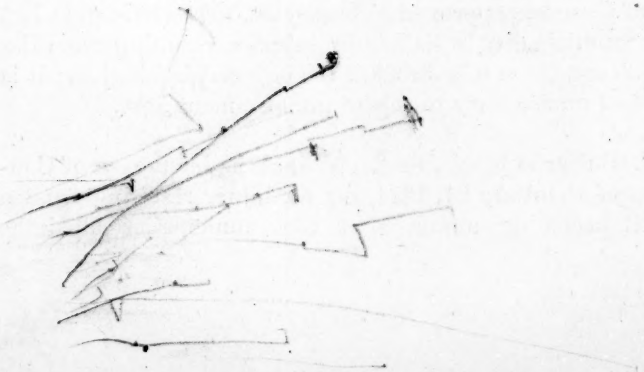
POINTS.

I. In the case of Maxwell *v.* District of Columbia, No. 137, a brief has been submitted discussing the question whether, under the charter of the District of Columbia, the act of Congress approved February 21, 1871, (16 Stat. at L.,) that municipality is liable for injuries resulting from the unsafe condition of a street in the city of Washington. It is deemed unnecessary to repeat the argument here.

II. But even if the District be liable under the act of Congress of February 21, 1871, for an injury resulting from a street becoming unsafe after the municipality called the

District came into existence, it is submitted that such liability is not imposed upon it with reference to a defect in a street, which occurred before the District government came into operation. In the case at bar, the grade at the place where the accident occurred, was lowered before the municipality sought to be charged was created. At the time when the accident occurred, the municipality called the District had been in operation only five months and a half; for the act of Congress of February 1, 1871, repealed the charter of the City of Washington, as of the date of June 1, 1871. Plaintiff adduced no evidence tending to show negligence on the part of the District. He relied and rested on evidence showing negligence by its predecessor. His proposition was "that the corporation of the District of Columbia, as the successor of the corporation of the City of Washington, is liable for the injuries resulting from a nuisance created by the said corporation of the City of Washington." (Second exception, Record 6.) Such unlimited liability for the acts of another could only be imposed by statute. But, on the contrary, section 40 of the act of February 21, 1871, is, in its terms, inconsistent with the imposition of such a liability upon the District.

EDWIN L. STANTON,
Counsel for the District.



W. S. vs
Morton
1 Otto 415-59.
is a motion
per ¶ 566 for
merits.